ABDUL KHODER SHAFIE

v.

LOW YAM CHAI

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[CIVIL APPEAL NO. 12-03-1987]
12 APRIL 1989

EVIDENCE: *Agreed bundle - Status of documents in agreed bundle - Admission by agreement - 3 categories of agreed bundles - Whether statement of a party in criminal case is substantive evidence in a civil suit - Inadmissible evidence - Judge arrived at a decision based on inadmissible evidence - Section 145 of Evidence Act - Witness can not be contradicted by previous statement - Judge failed to evaluate the evidence of the defendant - Contradictory statements made by the defendant - Evidence of a witness should be weighed and assessed.*

This is an appeal against the decision of the Judge of a Sessions Court in not granting general and special damages to the plaintiff. A collision occurred between a motorcycle ridden by the plaintiff and a car driven by the defendant. Both were proceeding in opposite directions. The plaintiff contended that the defendant in his car negligently and dangerously encroached onto his path and collided with his motorcycle. The Judge having no sketch plan to rely on, relied mainly on the evidence of the investigation officer which had been taken down by the Magistrate in the criminal suit of the fact situation. The evidence given by the defendant contradicted with the statement made by him in the criminal suit. Decision was arrived at by the Session Judge based solely on the evidence given by the investigating officer, who was not called as a witness in the civil suit and that of the defendant.

Held:

[1] Former statements of a witness in the criminal case does not become substantive evidence for the purposes of the civil suit.

[2] As such, the Judge was wrong in relying on the evidence of the investigating officer given at the criminal suit as the evidence was inadmissible.

[3] The statements of the investigating officer cannot be used in cross-examination of the plaintiff to contradict him since the plaintiff himself did not make the statements.

[4] The defendant's evidence consisted of contradictory statements. The Judge should have evaluated the evidence of the defendant who had given conflicting versions of the accident.

[5] The Judge having relied on inadmissible evidence and in not evaluating the defence and the testimony of the defendant, had made a wrong decision in not allowing the claim by the plaintiff.

[6] The defendant and plaintiff are liable for the accident on a 50-50% basis.

Cases referred to:
Yew Lean Finance Development (M) Sdn. Bhd. v. Tan Gin Thong [1985] CLJ (Rep) 826
Jones v. Griffith [1969] 2 All ER 1015, [1969] 1 WLR 795
Mullard v. Ben Line Steamers Ltd. [1971] 2 All ER 424, [1970] 1 WLR 1414
Wong Thin Yit v. Mohamed Ali [1971] 2 MLJ 175
Bobba Bhavamma v. Bobba Ramamma, 78 IC 176: A 1924, M 537
North Australian Co. v. Golds-borough Co. [1983] 2 Ch D 381

Legislation referred to:
Evidence Act 1950, ss. 32, 145, 155(c), 157

For the applicant - Ranjit Singh; M/s. Jagjit Singh & Co.
For the respondent - Visvanathan; M/s. Visva & Co.

JUDGMENT

KC Vohrah J:

I allowed the appeal against the decision of the Judge of the Sessions Court at Sungei Petani and I now give my written reasons for allowing the appeal.

The Judge of the Sessions Court dismissed the claim of the plaintiff who sought for special and general damages in regard to injuries suffered by him in an accident involving his motor cycle and the defendant's motor car.

On 30 July 1982 at about 5.00 p.m. a collision occurred between a motor cycle ridden by the plaintiff, who was proceeding in the direction of Bedong, and a car driven by the defendant, who was proceeding in the opposite direction. The accident occurred near the junction of Jalan Semeling and Jalan Bedong and along a bend.

The plaintiff contended that the defendant in his car negligently encroached into his path and collided with his motor cycle. The defendant on the other hand gave a conflicting version stating that the plaintiff's motorcycle had encroached into his path and collided into his car.

The Judge had no sketch plan to rely on as it had not been admitted. So when he dismissed the plaintiff's claim what he did was to rely on the notes of the evidence of the investigation officer which had been taken down by the Magistrate in Sungai Petani Magistrate's Court Arrest Case MAC (B) 414/83 although the officer was not called to testify in the civil suit. He relied on his former statement to the effect that broken pieces of glass were found where the defendant's stationary car was found after the accident and that some particular lamps of the car and the motor cycle were found broken; and based on these he came to the conclusion that the point of impact was at the defendant's right of way and that the plaintiff encroached into defendant's path; and the Judge further relied on his former statement that the rear tyre of the motor cycle was worn off and bald and concluded that, since it had been admitted that it was raining at the time of the accident, "the plaintiff acted dangerously by negotiating the sharp bend with a bald rear tyre and the slippery road condition at a speed resulted his motor cycle skidding and went to the other side of the road (*sic*)".

Having made these findings he then rejected the evidence of the plaintiff's witness, PW2, in the suit who said he was riding a motor cycle behind the plaintiff's motor cycle before the accident occurred; this man's evidence corroborated the evidence

of the plaintiff that the defendant's car encroached into the plaintiff's path and collided into the plaintiff's motor cycle. The Judge rejected his evidence on the ground that he was not an independent witness because "as a friend he would try to cover plaintiff's fault."

It is clear that the learned Judge in the face of conflicting versions as to how the accident took place relied on the evidence given by a police officer not before him but given in the Magistrate's Court to reach his conclusion that the accident took place on the defendant's path. As he clearly admitted, "without the sketch plan I had no choice but to reply on the evidence of the investigation officer in the traffic case ... which forms part of the agreed bundle of documents".

The record of the notes of evidence in Sungai Petani Magistrate's Arrest Case No. MAC(B) 414/3 was in the agreed bundle of documents which the Judge used in the civil suit.

There is no provision in the Subordinate Court Rules 1980 specifically for the use of the agreed bundle but in the Subordinate Courts the agreed bundle, especially in running down claims, is frequently filed in Court for the use of the presiding judicial officer hearing the relevant case although it would appear that the agreed bundle was expected to be used only by certain senior judicial officers in the Subordinate Courts in the seventies, the officers being then known as Special Presidents of the Sessions Court (see Practice No. 3 of 1970, para. 4(a)(1970) 2 MLJ and (iii)). What seems to be the present established practice in the Subordinate Courts stems from High Court practice. The High Courts rely on Practice Note 1 of 1969 ((1969) 1 MLJ & ii) and Practice Note No. 3 of 1970 ((1970) 2 MLJ xliii)) as amended by Practice Note No. 2 of 1977 ((1977) 1 MLJ x1vi).

Coming back to the appeal at hand. At the trial, the agreed bundle was referred to and marked " A". No mention was made as to what was agreed upon as regards the bundle. There should have been an expressed indication by both Counsels what they had in mind, what they had agreed about, in tendering the agreed bundle ("A") for use in the trial. What then was the agreement about?

There are 3 categories of such agreement and this matter has been dealt with in *Yew Lean Finance Development (M) Sdn. Bhd. v. Tan Gin Thong* [1985] CLJ (Rep) 826. To my mind, however, it is appropriate to reproduce what has been stated in respect of admission by agreement in 18 *Atkin's Court Forms* (2nd Edn.) (1985 issue) para. 40 at pp. 360 and 361:

> 40. Admission of evidence agreement. Much the most common method of admitting "written hearsay" in evidence is by agreement. It is in this way that medical reports, police reports, cargo surveys and the like are admitted every day. No particular form is necessary, but it is important that there should be no ambiguity as to what is agreed. There are three types of agreement:
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> (i) The parties may agree that a statement in a document should be agreed evidence upon the point, neither party being at liberty to controvert it by other evidence. This is the normal understanding when medical reports or the like are "agreed". If a party wishes to agree something less, he should make this clear. Where medical reports are incomplete or do not in fact agree, it is desirable that the doctors be called to give supplementary evidence [*Jones v. Griffith* [1969] 2 All ER 1015, [1969] 1 WLR 795: *Mullard v. Ben Line Steamers Ltd.* [1971] 2 All ER 424, [1970] 1 WLR 1414].

(ii) The parties may agree that a statement in a document should be admissible in evidence, each of them being at liberty to controvert it by other evidence. This is seldom a wise form of agreement, unless, of course, the maker of the statement cannot be called as a witness, when it may be unavoidable. If there is to be controversy and the maker of the statement is available, he should be called. In particular the Court will often refuse to decide a controversy of medical or scientific opinion on written statements. Accordingly, it is wrong for the parties to "agree" medical reports from doctors who differ on a point of substance.

(iii) The parties may agree document as a document. This dispenses with proof of its making and authenticity, but does not make it admissible."

The agreed bundle ('A') in the instant case comprises 5 documents; there are copies of 2 police reports (one by a police officer and the other by the defendant) relating to the accident, a copy of a sketch plan and its key, a copy of a medical report of the injuries suffered by the plaintiff, and a copy of the notes of evidence of the trial in the Magistrate's Court.

Now, it was conceded by both Counsels that the sketch plan and key were disputed documents at the trial although it was included in the agreed bundle. The Judge in fact lamented the fact that he could not rely on the sketch plan.

In regard to the other documents relating to the police report made by the defendant they were referred to at the trial without any objection. There was objection to the use of the medical report but it was ruled admissible under s. 32 of the Evidence Act. As for the police report made by the police officer it was not at all referred to at the trial.

In regard to the record of the notes of evidence contained in the agreed bundle the references to it by both Counsels were for the fairly specific purposes to which I will be alluding shortly.

The record relates to notes of evidence made by the Magistrate at the trial of the plaintiff who was the accused in respect of a traffic offence relating to the same accident. He was acquitted at the close of the prosecution's case after 5 witnesses had testified against him. Two of the witnesses were the defendants in the civil suit and one Shoib bin Salam who subsequently testified for the plaintiff's case in the civil suit. The other 3 were police witnesses. One of them was the investigating officer of the case. Another was one who prepared the sketch plan of the accident scene and yet another was one who took a police report from the plaintiff. References by both Counsels during the civil trial were only to the former statement at the criminal trial made by the defendant in the civil suit, Shoib, and the investigation officer.

The defendant was crossed-examined by the plaintiff's Counsel as to discrepancies between his testimony at the trial of the case and his former statements in the Magistrate's Court and clearly the use of certain parts of the man's former statements was to impeach the credit of the defendant, permissible under ss. 145 and 155(c) of the Evidence Act 1950. It is also clear that the former statements of the defendant in the criminal case does not become substantive evidence for the purposes of the civil suit (see the Federal Court case of *Wong Thin Yit v. Mohamed Ali* [1971] 2 MLJ 175 at 178 and 180.

Shoib's former statements made in the Magistrates Court was made use of by the plaintiff's Counsel, obviously as corroboration under s. 157 of the Evidence Act 1950 of his testimony at the civil trial. Again the former statement does not constitute substantive evidence (see *Wong Thin Yit, ibid*).

From the use of the former statements of both the defendant in the civil suit and Shoib as stated earlier, it is apparent that the purpose of including the record of the notes of evidence containing these statements in the agreed bundle was to dispense with the person, i.e. the Magistrate, who recorded the notes, from coming to Court and producing the record. Looking at the nature of evidence of those witnesses who gave evidence as police officers on behalf of the prosecution at the criminal trial, it can hardly be said that Counsel for the plaintiff would have agreed to the admission of the statements of these police witnesses as evidence in the civil suit especially the statements of the officer who drew and explained the sketch plan (when the sketch plan was a disputed document) and the statements of the investigating officer where the evidence he gave in the Magistrate's Court appears inimical to the interest of the accused (the plaintiff in the civil suit). There was confusion at the trial before the Judge as to the status of the various documents in the agreed bundle. Defence Counsel, as earlier stated, objected to the admissibility of the medical report although included in the agreed bundle but the Judge ruled it admissible under s. 32 of the Evidence Act 1950 probably on the ground that the doctor who made it is dead. While the sketch plan and key were in the agreed bundle they were treated as disputed documents. The former statements in the record of evidence were resorted to in order to corroborate or discredit witnesses and the statements of the investigating officer were used in cross-examination of the plaintiff to contradict him although the plaintiff himself did not make the statements. (I shall discuss this aspect later). To my mind the record of the notes of evidence is merely a document which falls within the third category of agreement earlier mentioned. Though the parties did not expressly say what was agreed upon, the clear implication which can be gleaned from the aforesaid circumstances, to my mind, was that the parties agreed the record as a document, obviating the necessity of proving the making and authenticity of the document.

Such agreement not rendering the contents of the record as admissible, being used only for the limited purpose of testing the testimony of witnesses i.e., the defendant in the civil suit and the plaintiff's witness, Shoib, against their own former statements in the same matter for impeachment or corroboration, and the investigating officer not having been called as a witness in the civil suit, his former statement is inadmissible and cannot constitute substantive evidence against the plaintiff in the civil suit as the learned Judge treated it to be so. The learned Judge was clearly wrong for relying on the former statement of the investigating officer as evidence when he was not called as a witness and for relying wholly on such statement to come to the conclusion that the plaintiff was negligent.

On other matter in regard to the statement of this officer contained in the agreed document. The officer's statement as to his finding the back tyre of the plaintiff being bald was used by defence Counsel in the cross-examination of the plaintiff to contradict the plaintiff when that plaintiff claimed his back tyre was not bald. This was clearly wrong. Under s. 145 of the Evidence Act a witness cannot be

contradicted by previous statements not of himself but of a third party (see *Bobba Bhavamma v. Bobba Ramamma*, 78 IC 176: A 1924, M 537). The witness cannot be told what third persons have said or deposed and asked if he contradicts them (*North Australian Co. v. Goldsborough Co.* [1983] 2 Ch D 381). As it was, the learned Judges seized on this statement of the investigating officer that the rear tyre of the motor cycle was bald and made a finding which was not pleaded by the defendant that "the plaintiff acted dangerously by negotiating the sharp bend with a bald rear tyre and the slippery road condition at a speed that resulted his motor cycle skidding and went to the other side of the road (*sic*)". The defendant himself stated in his evidence at the trail that the plaintiff's motor cycle, the second in a line of 4 or 5 motor cycles, encroached on to his path and fell after the first motor cycle (which was 10 to 20 feet ahead of the plaintiff's motor cycle) had fallen, the implication being that the plaintiff, in order to avoid the first fallen motor cycle, had encroached on to his path.

Before I pass on to another matter I would like to note that the defence Counsel, in his written submission to the Judge of the Sessions Court, requested the Judge to refer to the sketch plan and key although he acknowledged in the submission, in the same breath, that they were disputed documents (see p. 62 of the Session's Court Appeal Record). Why he did that I find it difficult to understand but whatever the reason he may advance for making such a request it only helped further to confuse the status of the documents in the agreed bundle.

The learned Judge said he did not rely on the sketch plan. Instead he relied on the inadmissible statement of the investigation officer to come to his finding that the point of impact was on the defendant's right of way and that the plaintiff riding his motor cycle with a bald rear tyre acted dangerously by negotiating the sharp bend which was slippery after the rain at a fast speed as a result of which the motor cycle skidded and went to the other side. This matter of the negotiating a wet slippery bend on a bald tyre at a speed was not pleaded by the defendant and in my view the finding of the Judge was a matter of conjecture. The Judge instead should have considered the plaintiff's evidence. He did not at all do so, merely stating that it was another version of the accident.

The evidence of the plaintiff was that as he took the bend at about 30-40 m.p.h. he saw the car encroach into his path; the car was not travelling fast; one if its tyres had crossed the centre white line. He tried to avoid the car by swerving to his left and at time of the collision half of the car body had encroached into his path. He denied he skidded into the defendant's path and he denied he was telling lies. It will be noted that the defendant's story was not at all put to the plaintiff about there being 4 or 5 motor cycles proceeding along the road in single file just before the accident and that his (the plaintiff's) motor cycle was the second one in the line of motor cycles, and that the first motor cycle in the file fell down and that as a result the defendant's motor cycle also fell down and went on to the other side.

Defendant's witness, Shoib (PW1), stated that just before the accident he was riding a motor cycle at about 30 m.p.h. behind the plaintiff's motor cycle when the plaintiff's car skidded and encroached into the plaintiff's path and knocked into the defendant's motor cycle. Under cross-examination he said that at the time of the

accident half of the car was on his side of the road and he said he saw the plaintiff trying to avoid the car by swerving to his left. He also stated that when he followed the plaintiff he was travelling near to the left edge (his side) of the road "but the plaintiff was travelling in the middle of the road on his side". He said that the plaintiff swerved to his left but the car collided into him. And the plaintiff's motor cycle fell on his side of the road. He too was not asked whether there had been 4 or 5 motor cycles proceeding in single file on the road nor whether the first motor cycle in the file had fallen down and as result of which the plaintiff's motor cycle fell too.

The Judge did consider the evidence of PW2 but only cursorily and he rejected it only after he found the plaintiff to blame for the accident relying on the former statement of the investigating officer on the ground that as "a friend of the plaintiff he (i.e. PW2) would try to cover plaintiff's fault." The learned Judge also failed to observe that this former statement made at the Magistrate's Court substantiated his testimony. That certainly should be given weight when the Judge assessed his evidence.

Now, PW2 had stated that after the plaintiff fell down he too fell down. The Judge asked why PW2 should have fallen down and said that PW2 did not give an explanation as to why he fell.

The learned Judge also did not at all evaluate the evidence of the defendant who gave a conflicting version of the accident. Had he done so he would have seen many inconsistencies in that man's evidence inherent therein and when viewed against his former statement given in the Magistrate's Court. Instead he took a portion of the defendant's evidence as the truth and used it to reject the evidence of PW2. First he stated:

> Why did PW2 fall down? No explanation from him. According to PW2, he followed the plaintiff from behind on his motor cycle. But the defendant said that the first motor cycle fell down first but did not knock into his motor car. It was the second motor cycle which was behind the first motor cycle that skidded, fell down and knocked into his car.

Then, having set out the defendant's story, he accepted it as the truth without more and straight away came to the conclusion:

> That shows that PW2 fell down first. On seeing PW2 fall down in an attempt to avoid him, he lost control of his motor cycle movement thus skidded, fell down and caused the collision.
>
> He also said, There is no reason for the defendant to lie as to which motor cycle fell down first. He also mentioned that in his police report.

But the point is, the defendant's story was never put to Shoib (PW2) (or for that matter to the plaintiff himself) and the police report of the defendant was made some 3 hours after the accident and there are discrepancies therein when compared with his former statement before the Magistrate and his testimony before the trial Judge.

Finally the learned Judge said:

> I doubt PW2's credibility. He also did not lodge police report. He could be the cause of the accident.

Doubting PW2's credibility without giving proper reasons for doing does not amount to much. The failure to lodge a police report was explained by PW2 - he said he did not lodge one as he was not involved in the accident and he did not think it was necessary to do so and that is a perfectly valid reason. As to the Judge's view that PW2 could have probably have been the cause of the accident is mere speculation.

The Court should have evaluated the defence pleaded and the testimony of the defendant.

In the statement of defence, the defendant denied the claim of the plaintiff that he was negligent and that his car had encroached into the plaintiff's path and collided into the plaintiff's motor cycle. The defence was that the collision was caused solely or substantially contributed to by the negligence of the plaintiff and amongst the particulars set out that these were that there was a failure on the part of the plaintiff to heed the warning and/or signal given by the defendant, that the plaintiff cut across the defendant's path and/or right of way and encroached into the path and/or right of way of the defendant and his motor car.

The defendant in his evidence, however, admitted that he did not sound the horn or give a light signal because the accident happened so quickly, and he also admitted that the motor cycle did not cut across his path. In his evidence too, he stated that as he approached the bend he saw 4 or 5 motor cycles coming from the opposite direction. The first motor cycle fell and the second motor cycle, the plaintiff's motor cycle, also fell down and collided with his car. He said that after the collision he stopped his car.

In his police report, however, he stated that as he reached the bend he saw 4 or 5 motor cycles reaching the bend and that the first motor cycle fell but did not touch him and that the second motor cycle also fell and was thrown to the right of the motor cycle and that the motor cycle collided into his car.

Under cross-examination he said, however, that as he was negotiating the bend, which was a sharp bend (not approaching it, as was stated earlier in the police report) he saw the first motor cycle and it was about 200 feet away with the said motor cycle about 20 to 30 feet behind the first one. This is in direct contradiction to what he stated in his police report and in his former statement made before the Magistrate. He was asked in the Magistrate Court when he first saw the motor cycle - whether it was along the road or, after it fell and he said, he saw it was falling down. Again in his former statement he said that when he saw the first motor cycle fall, (and it will be remembered that earlier in the former statement to the Magistrate, as was observed above, he had stated that was the first time he saw the motor cycle), he did see the said second motor cycle and it was about 30 feet away. If so, this is again inconsistent with his testimony before the Judge where he said that he first saw the motor cycles 200 feet away and the second motor cycle (the plaintiff's motor cycle) was 20 to 30 feet away behind the first.

In his testimony before the Judge he also said that the first motor cycle was speeding at 40 m.p.h. and that it fell. In contrast in his former statement he said that the two motor cyclists fell because they were travelling fast and they could not control their vehicles as they were travelling at 60 m.p.h. There is a great difference between a speed of 40 m.p.h. and 60 m.p.h. It is not disputed that both

motor cyclists had pillion riders with them and apart from the contradiction relating to the speed the second motor cyclist was riding at, it seems improbable that a motor cycle with rider and pillion could go as fast as 60 m.p.h., and it seems to me that his testimony before the Judge that the motor cycle was speeding at 40 m.p.h. was to make his story more plausible.

Then the defendant said in his testimony that the knew the area was a "speed limit" area and when confronted with his former statement where he stated it was not, he lamely agreed it was not.

All these inconsistencies in his testimony *vis-a-vis* his former statement and the police report should put any judicial officer on guard when assessing the defendant's evidence. Unfortunately the defendant's version of the accident was accepted without any evaluation after the learned Judge found the plaintiff negligent on the basis of the investigation officer's former statement.

The defendant denied that there were only two motor cycles on the road and that his car encroached into the path of the first motor cycle (ridden by the plaintiff) and collided with it. He said that 10 feet after passing the first motor cycle when it fell the second motor cycle collided into his car. His car stopped dead at the spot of collision. He disagreed that his car could not stop dead when travelling at 30 m.p.h. even if he had applied his brakes. He, however, changed his story under re-examination and said that when the first motor cycle skidded he applied his emergency brakes and his motor car moved for a short distance and stopped.

The defendant to my mind was not telling the truth when he gave his version of the accident.

In contrast the plaintiff withstood cross-examination and was consistent. As I have stated earlier his evidence was not assessed by the Judge. Had he done so and had not been prejudiced by the inadmissible former statement in the Magistrate's Court of the investigating officer he would have found it consistent with the story of PW2 whose former statement given at the Magistrate's Court corroborated what he stated. Both the plaintiff and PW2 were never cross-examined as to the defendant's version of the accident that there were 4 or 5 motor cycles, that the first motor cycle fell down, that the defendant avoided the first motor cycle, that the said motor cycle fell and then knocked into his car. Why not if that was indeed the truth? The story of the plaintiff taken together with the story by PW2 is more consistent and credible. In my view the accident took place when the car of the defendant collided into motor cycle of the plaintiff on plaintiff's side.

It will be remembered, however, that PW2 stated that just before the accident the plaintiff was travelling in the middle of the road on his side. From all the evidence that was adduced it is clear that there was no vehicle to the left of the plaintiff and he should have ridden close to the edge of the road. He had no business to be in the middle of the road on his side approaching or at the bend. It was an irresponsible act bearing in mind that he was carrying a pillion rider which made his motorcycle less maneuverable and less responsive to evasive action along a bend with a wet road surface. On his own admission the approaching car was not proceeding fast and it seems to me if he had kept close to the left side of the road

he was travelling on, the accident could have been avoided. In the circumstances he was equally responsible for the accident and I allowed the appeal on the basis of 50 - 50% liability.

Hearing on the matter of the quantum of damages was adjourned to another date as the parties indicated likely settlement on the amount.

Also found at [1989] 2 CLJ 1174